DATUK DR HJ HAMID SULTAN ABU BACKER v. PENGERUSI JAWATANKUASA ETIKA HAKIM-HAKIM ('CHAIRMAN OF THE JUDGES' ETHICS COMMITTEE') & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MARIANA YAHYA J
[JUDICIAL REVIEW NO: WA-25-313-10-2020]
19 FEBRUARY 2021

ADMINISTRATIVE LAW: *Judicial review – Leave – Application for – Enquiry following complaints against judge by other judges – Allegations of breach of Judges' Code of Ethics 2009 – Whether enquiry had taken place – Whether there was final decision that conclusively determined rights of applicant – Whether application for leave premature – Whether attempt to circumvent decision-making process – Whether abuse of court's process – Rules of Court 2012, O. 53*

CIVIL PROCEDURE: *Judicial review – Leave – Application for – Complaints levelled against judge – Allegations of breach of Judges' Code of Ethics 2009 – Request for proceedings to be conducted in open forum with access to public – Whether proceedings to be conducted in camera – Judges' Ethics Committee Act 2010, ss. 8 & 9*

CIVIL PROCEDURE: *Judicial review – Leave – Application for – Complaints levelled against judge – Allegations of breach of Judges' Code of Ethics 2009 – Whether there was conflict of interests amongst members of Judges' Ethics Committee – Whether appointment of members of Committee in accordance with laws – Whether constitution and composition of Committee in accordance with laws – Federal Constitution – Judges' Ethics Committee Act 2010, ss. 5(2) & 10*

CIVIL PROCEDURE: *Judicial review – Leave – Application for – Complaints levelled against judge – Allegations of breach of Judges' Code of Ethics 2009 – Judge issued with notice and appendix bearing alleged breaches – Whether appendix amounted to charge – Whether Judges' Ethics Committee acted ultra vires – Whether notice and appendix validly issued*

Two written complaints were levelled against a sitting judge of the Court of Appeal ('applicant'), by other judges, to the Chief Justice, pertaining to the applicant's act and/or comments in His Lordship's grounds of judgment, *PP v. Aluma Mark Chinoso & Anor,* and affidavit. The impugned judgment and affidavit concerned, *inter alia*, the revelation of interference in the Judiciary, the independence of the Judiciary, the doctrine of separation of powers and the rule of law. According to the complainants, the applicant's act and/or comments brought the Judiciary into disrepute. Following the complaints received, the Chief Justice, in Her Ladyship's capacity as the Chairman of the Judges' Ethics Committee ('first respondent'), issued to the applicant the Chairman's notice and attached to it was Appendix A, which particularised

A the alleged breaches of several provisions of the Judges' Code of Ethics 2009 ('JCE'). The applicant, upon being invited to be heard, requested for the names of the members of the Judges' Ethics Committee ('second respondent') and the author of Appendix A. The first respondent informed the applicant that it was the members of the second respondent who prepared Appendix B A. The applicant (i) questioned the jurisdiction and legality of the second respondent in taking up such exercise as the Royal Commission of Inquiry was already set up by the Cabinet to investigate the matters raised in the impugned affidavit; and (ii) raised various objections on the composition of the members of the second respondent. According to the applicant, His C Lordship had made statements in the impugned affidavit which raised issues regarding some members of the second respondent and these members were clearly conflicted as they had nexus to the subject matter of the proceedings. The applicant then requested for, *inter alia*, the proceedings before the second respondent to be in an open forum but the request was refused by the first D respondent. Hence, the present application by the applicant for leave to commence judicial review, pursuant to O. 53 of the Rules of Court 2012, to challenge (i) the respondents' decision in refusing the applicant's request for the proceedings to be heard in an open forum with access to the public; (ii) the constitutionality, composition and validity of the members of the second respondent to sit in the proceedings against the applicant; and (iii) the E validity of the Chairman's notice and Appendix A as, according to the applicant, the respondents acted *ultra vires*/beyond the power conferred upon them by the statutes by framing what appeared to be charges in Appendix A.

Held (dismissing application):

F **(1)** The word and/or phrase used in s. 8 of the Judges' Ethics Committee Act 2010 ('JECA') is clear, plain and unambiguous and should be construed as mandatory and not directory. Based on the Bill and the Hansard, the intention of the Legislature when enacting the JECA was to have the proceedings of the Committee to be conducted *in camera* and G not to be opened to public in order to maintain judicial sanctity. Section 9 of the JECA further provides that the disciplinary proceedings of the Committee shall not be a trial but an enquiry. Therefore, like any other disciplinary proceeding, such enquiry should be done domestically and/or internally in accordance to the relevant laws regulating such proceedings, in this case the JECA. (paras 29, 31 & 37)

H **(2)** The impugned affidavit did not mention specifically the judges' names. This objection by the applicant was unjustifiable since it had not specifically mentioned the judges who had the conflict of interest, as claimed. The applicant had the onus to prove the facts that he asserted. I The issue of bias must be proven. The applicant could not be on a fishing expedition trying his luck to any shot just to disqualify the Committee members. The applicant must prove those facts really existed. (para 43)

(3) The appointment of the members of the second respondent was in accordance with s. 5(1) of the JECA. The constitution and composition of the second respondent was also in accordance with the Federal Constitution, the JECA and the JCE. The first respondent, the Chief Justice, was the Chairman of the second respondent by virtue of s. 5(2) of the JECA. The complainants were other judges. There was no hindrance for the first respondent to preside as the Chairman of the second respondent in the proceedings. Furthermore, s. 10 of the JECA provides the procedure for such conflict of interest to be disclosed and recorded in the proceedings and the members of the second respondent, including the first respondent, who made such disclosure, shall not take part in the deliberation or decision made by the second respondent. Based on the clear wordings of s. 10 of the JECA, the proper forum for the members of the second respondent to disclose any conflict of interest should be done in the proceedings before the second respondent itself. It was a total misconception for the applicant to move this court to remove the first respondent from the composition of the second respondent as this court was not the proper forum to do so. Likewise, the challenges brought by the applicant against the composition of the second respondent, particularly towards other members of the committee, could not stand based on the same above-stated grounds. Whether there was a conflict of interest amongst the members of the second respondent, against the proceedings brought before the second respondent, was not to be determined by this court. (paras 47-50)

(4) A charge is a notice to the accused of the matter that he is accused of and it is an information to the court of the matters to which evidence is to be directed. Appendix A comprised the facts of the alleged breach of the JCE. It was not a charge or charges, as claimed by the applicant, for the followings reasons: (i) the heading of Appendix A itself clearly indicated 'Facts of the Alleged Breaches'. This court could not make any other interpretation other than what had been clearly and precisely stated; and (ii) the facts did not, in any way, form a charge as it did not comply with the requirements provided under the Criminal Procedure Code, in order to form a charge. The Chairman's notice and Appendix A were validly issued by the respondents and were in accordance with the law. (paras 56 & 59-62)

(5) There was no decision that had conclusively determined the rights of the applicant as the Judge of the Court of Appeal. Nothing affected the rights of the applicant to pursue his defence in the ongoing proceedings before the second respondent. The enquiry had not even taken place. The present proceeding was premature, amounted to an abuse of the court's process and was an attempt to circumvent the decision-making process entrusted upon the respondents by the statutes. The respondents should be allowed to complete the enquiry in order to determine whether the applicant had breached the JCE. (paras 69, 70 & 72)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Birich Bhivan v. State of Bihar AIR 1963 SC 1120 ***(refd)***

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(refd)***

Dato' Sri Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal [2020] 2 CLJ 73 CA ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

Hee Nyuk Fook v. PP [1988] 1 LNS 15 SC ***(refd)***

Humayoon Shah v. R (21) WR 72 ***(refd)***

International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***

Krishnadas Achutan Nair & Ors v. Maniyam Sanykano [1997] 1 CLJ 636 FC ***(refd)***

Lee Kok Wai & Anor v. Securities Commission Malaysia [2015] 4 CLJ 260 HC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Mejar Ali Zaman Ali Hassan v. Capt Abdul Kadir & Anor [1989] 2 CLJ 643; [1989] 2 CLJ (Rep) 117 HC ***(refd)***

PP v. Aluma Mark Chinonso & Another Appeal [2020] 1 LNS 584 CA ***(refd)***

PP v. Teoh Choon Teck [1962] 1 LNS 141 HC ***(refd)***

R v. Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] Crown Office Digest 109, Dip ***(refd)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 152, 153, 154, 155, 156, 157, 158(2), 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 171A, 172

Evidence Act 1950, ss. 101, 102

Federal Constitution, arts. 5, 8, 125(3A)

Judges' Ethics Committee Act 2010, ss. 4, 5(1), (2), 8, 9, 10

Rules of Court 2012, O. 53 rr. 2(4), 3(1)

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Watching brief -

For the (SUHAKAM) - Nizam Bashir; M/s Nizam Bashir & Assocs

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Reported by Najib Tamby

JUDGMENT

Mariana Yahya J:

Introduction

[1] This is the applicant's application for judicial review under O. 53 Rules of Court 2012 which seeks *inter alia* for the followings:

(i) That the applicant be granted leave to commence judicial review for the reliefs set out hereunder;

(ii) An order of *certiorari* to remove into the High Court for the purposes of it being quashed the decision of the respondents particularised in the first respondent's letters dated 28 September 2020 and 29 September 2020 and/or to carry on the Judges' Ethics Committee's proceedings *in camera*;

(iii) A declaration that the respondents' decision particularised in the first respondent's letters dated 28 September 2020 and 29 September 2020 are null and void for breaches of arts. 5 and 8 of the Federal Constitution, principles of natural justice, procedural fairness and irrationality;

(iv) A declaration that the respondents have acted unconstitutionality and/or *ultra vires* their powers in preparing the charges as particularised in Appendix A to the first respondent's notice dated 10 August 2020;

(v) A declaration that the charges prepared by the respondents as particularised in Appendix A to the first respondent's notice dated 10 August 2020 are null and void;

(vi) A declaration that the composition and constitution of the seven members of the second respondent as particularised in the first respondent's letter dated 24 August 2020 to preside, hear and/or deliberate over the complaints and matters raised in the first respondent's notice dated 10 August 2020, breaches the rules of natural justice, procedural fairness and/or the rule of law;

(vii) A declaration that the first respondent, as Chairman of the Judges' Ethics Committee is disqualified to preside, hear and/or deliberate over the complaints and matters raised in the first respondent's notice dated 10 August 2020;

(viii) A declaration that the six members of the Judges' Ethics Committee as particularised in the first respondent's letter dated 24 August 2020 constituted by the first respondent to preside, hear and/or deliberate over the complaints and matters raised in the first respondent's notice dated 10 August 2020 be set aside and/or dissolved;

(ix) A declaration that the first respondent's notice dated 10 August 2020 be set aside as it is unconstitutional and in breach of the principles of natural justice, procedural fairness and/or the rule of law;

(x) That all proceedings before the Judges' Ethics Committee against the applicant be forthwith stayed until further orders and/or determination of this Honourable Court; and

(xi) That there be no order as to costs.

[2] It is also important to note that the applicant in this action has also filed a separate suit in this court challenging the validity and constitutionality of the said first respondent's notice dated 10 August 2020 *vide* Originating Summons No. WA-24-55-10-2020 ("OS No. 55").

Salient Facts

[3] The applicant, at material and present times, is a sitting judge of the Court of Appeal, Malaysia.

[4] The first respondent is the Chairman of the Judges' Ethics Committee in which by virtue of s. 5(2) of the Judges' Ethics Committee Act 2010 (JECA 2010), the Chief Justice shall be the chairman of the committee.

[5] The second defendant is the Judges' Ethics Committee that is constituted under JECA 2010.

[6] The crux of the dispute which led to the filing of this judicial review application by the applicant revolves around two written complaints levelled against him by other judges to the first respondent pursuant to para. 12 of the JCE 2009. For ease of reference, para. 12 of JCE 2009 provides the followings:

> Complaint Against Judge
>
> 12. Any complaint against a judge who is alleged to have committed a breach of any provision of this Code shall be made in writing to the Chief Justice of the Federal Court.

[7] Basically, the complaints were that the applicant's act and/or comments had brought the Judiciary into disrepute. The court refers to the two complaint letters to the Chief Justice by one Court of Appeal Judge and a High Court Judge which state as follows:

(i) Excerpt from the letter by the Court of Appeal Judge is as follows (exhs. "A-2", applicant's affidavit in support, pp. 20 and 21);

> YAA Tan Sri Tengku Maimun binti Tuan Mat
> Ketua Hakim Negara, Mahkamah Persekutuan,
> Istana Kehakiman,
> Putrajaya 23hb Jun 2020
>
> YAA Tan Sri,

Aduan mengenai YA Datuk Dr Hamid Sultan bin Hj Abu Backer Hakim Mahkamah Rayuan

Perkara di atas dengan segala hormatnya dirujuk.

Saya telah membaca penghakiman YA Datuk Dr. Hamid Sultan bertarikh 17 Jun 2020 dalam kes *Public Prosecutor v. Aluma Mark Chinonso*, iaitu kes berkaitan dengan sesyen 39B Akta Dadah Berbahaya 1952.

[2] Dalam penghakiman tersebut, saya dapati YA Datuk Dr. Hamid Sultan telah membuat pengataan-pengataan yang tidak wajar yang memberi gambaran negatif terhadap Badan Kehakiman.

[3] Sebelum ini, YA Datuk Dr. Hamid Sultan juga telah membuat pengataan-pengataan yang memburukkan imej hakim-hakim dan Badan Kehakiman Malaysia, melalui afidavit yang diikrarkan olehnya. Afidavit YA Datuk Dr. Hamid Sultan ini difailkan dalam tindakan OS WA-24NCvC-97-01/2019 yang dibawa oleh Sangeet Kaur Deo terhadap Ketua Hakim Negara, di Mahkmah Tinggi Kuala Lumpur.

[4] Antara pengataan YA Datuk Dr. Hamid Sultan dalam afidavit tersebut, ialah tentang keputusan Mahkamah Rayuan dalam kes *Karpal Singh v. Pendakwa Raya*, yang mana saya adalah salah seorang ahli panel.

[5] Saya kemukakan perkara ini untuk perhatian dan tindakan YA jua.

... TT ...

(Datuk Kamardin bin Hashim)

(ii) Excerpt from the letter by the High Court Judge is as follows (exhs. "A-2", applicant's affidavit in support, p. 22);

YAA TAN SRI TENGKU MAIMUN BINTI TUAN MAT
Ketua Hakim Negara
Istana Kehakiman,
Putrajaya
23hb Jun 2020

YAA Tan Sri,

SERANGAN OLEH SEORANG HAKIM KE BADAN KEHAKIMAN MELALUI ALASAN PENGHAKIMAN DAN AFIDAVIT BELIAU DALAM TAHUN 2019 DAN 2020

(1) Adalah saya merujuk kepada perkara di atas dan terlebih dahulu saya memohon maaf sekiranya surat ini dibuat menyalahi peraturan yang ada. Namun saya percaya apa yang saya ingin menarik perhatian YAA Tan Sri Ketua Hakim Negara adalah lebih mustahak ditangani dari terus berleluasa.

(2) Dari pemerhatian saya sejak dari tahun lepas 2019 dan hingga ke tahun ini YA Dato Haji Hamid Sultan iaitu Hakim Mahkamah Rayuan telah menggunakan alasan penghakiman beliau dan afidavit bagi menyerang antara sesama sendiri ahli-ahli Badan Kehakiman dan keputusan Mahkamah Persekutuan.

(3) Semasa YAA Tan Sri Richard Malanjum memegang jawatan sebagai Ketua Hakim Negara telah memanggil satu perjumpaan tergempar antara Hakim-hakim di Istana Kehakiman tetapi tiada apa-apa tindakan diambil. Hasilnya Hakim yang sama melalui penghakiman terbaharu di dalam kes *PP v. Aluma Mark Chinoso* [Nigerian] B-05(LLB) masih tidak rasa insaf.

(4) Saya percaya adalah menyalahi undang-undang dan adab untuk penghakiman seseorang Hakim membelakangi keputusan Mahkamah Persekutuan atau membincangkan isu diluar kes tersebut dan memberi komentar yang menyerang tanpa had keputusan penghakiman orang lain dan tersasar dari merit kes. Ianya adalah suatu fenomena yang perlu disekat dari menular. Agar tidak memberi gambaran boleh diamalkan oleh Hakim-Hakim lain.

(5) Tujuan saya hanyalah satu agar Badan Kehakiman tetap dihormati bukannya sewenang-wenang Hakim mencerca sesama Hakim yang lain untuk menunjukkan orang di Badan Kehakiman adalah jahat dan jahil kecuali diri kita yang baik dan pandai.

Sekian, terima kasih.

... TT ...

AZMAN BIN ABDULLAH

[8] From the above excerpts, the complaint letters from the respective Court of Appeal and the High Court Judges could be understood as also pertaining to the impugned judgment in 2020 and the impugned affidavit in 2019. In addition, the High Court Judge was of the view that the plaintiff had abused his grounds of judgment by including irrelevant comments which are not related to the case and also offensive comments against the grounds of judgment of other judges.

[9] It is suffice to say that the complaints were lodged concerning the detrimental allegations made by the applicant in his grounds of judgment written for the Court of Appeal Criminal Appeal Nos: B-05(LLB)-449-09-2018 & B-05(M)-453-09-2018 in the matter of *PP v. Aluma Mark Chinonso & Anor* [2020] 1 LNS 584 (impugned judgment) as well as in his own affidavit affirmed for the Kuala Lumpur High Court Originating Summons No. WA-24NCvC-97-01-2019 (impugned affidavit) whereby such allegations pertaining to the revelation of interference in the Judiciary, the independence thereof, the doctrine of separation of powers, and the rule of law and all other incidental matters, as well as the applicant's opinion are allegedly in some way or another could tarnish or disrepute other judges specifically and the judicial institution as a whole.

[10] Flows from the said exposure, the applicant claimed that the then Chief Registrar of the Federal Court had lodged a police report arising from the matters raised in the impugned affidavit and this was reported in the media on 15 February 2019. Thereafter, the former Prime Minister, Tun Dr Mahathir Mohamad had made an announcement that the Cabinet had agreed to set up the Royal Commission of Inquiry (RCI) to investigate the matters raised in the impugned affidavit. Once again, the matter has then become public knowledge since it was reported on 21 February 2019.

[11] Further, the applicant also asserts that the Bar Council has complemented the Government's call on the establishment of an RCI to probe and investigate the matters raised in the said impugned affidavit. The applicant also contended that the former Prime Minister had dismissed the proposal for an internal inquiry to probe allegations of judicial misconduct and instead favored an RCI and this also was made known to the public when it was reported on 5 June 2019.

[12] The applicant in his affidavit in support also alleged that the previous Chief Justice of Malaysia did state that an internal investigation was conducted but was suspended in light of the police investigation. The applicant also claimed that the previous Chief Justice of Malaysia through a press release did state that a judge cannot be reprimanded for his decision-making process and/or his judgment and that any reprimand runs contrary to the notion of independence of Judiciary.

[13] Pursuant to the complaints received, the first respondent issued the chairman's notice dated 10 August 2020 alleging that the applicant had breached several provisions of the Judges' Code of Ethics 2009 ("JCE 2009") and hence invited the applicant to be heard after found that there were merits on those complaints. Subsequently, through the applicant's solicitor's letter dated 18 August 2020, the applicant requested for the names of the members of the second respondent and the author of Appendix A (exh. "A-2" applicant's affidavit in support, encl. 2, pp. 23-30) to the chairman's notice. The first respondent did reply through a letter dated 24 August 2020 stating that it was the member of the second respondent who prepared the said Appendix A.

[14] *Vide* his reply dated 7 September 2020, the applicant disputed all the allegations brought against him in the said chairman's notice. The applicant also did question the jurisdiction and legality of the second respondent in taking up such an exercise instead of allowing the RCI to probe/investigate the matters raised in the impugned affidavit.

[15] Through his solicitors' letter dated 17 September 2020, the applicant raised various objections particularly pertaining to the composition of the members of the second respondent as follows:

(i) That some of the members of the committee have been on the panel of either the Court of Appeal or Federal Court that heard the appeals in Anwar Ibrahim and Karpal Singh matters or have some nexus to these matters. These matters are the subject-matter of the applicant's impugned affidavit.

(ii) The members of the committee who were part of the panel that heard the appeals in *Anwar Ibrahim* and *Karpal Singh* or have nexus to these cases will be conflicted and cannot now be part of the committee to hear and decide on the complaints which forms the basis of the chairman's notice dated 10 August 2020, since the complaints are with respect to the impugned affidavit.

(iii) Having such nexus to these two matters are sufficient reasons for those members of the committee involved not to participate in deliberating on the matters arising from the notice.

(iv) Further, one of the complaints set out at Appendix A to the notice is the alleged criticism levied of judges with a single degree (refer para. 14(b) Appendix A of the notice). It now appears that some of the members of the committee are from the same university. Coincidentally, the two complainants are from the same university.

(v) In this respect, those present at the Italian lunch mentioned at paras. 7 and 8 of the impugned affidavit are from the same university, save for the applicant. A table seating at this Italian lunch reinforces the same. Consequently, the perception will be that those from the same university would appear to be inclined to protect themselves/each other.

(vi) By allowing members of the committee from the same university to hear and decide on the complaints or the notice would tantamount to gross conflict of interest and breach of natural justice.

(vii) In addition, since it is the committee that drafted the charges against the applicant as per Appendix A, it is only proper on the part of the committee to recuse themselves from further participating, for one cannot be judge, prosecutor and jury in the same cause.

[16] The applicant then through his solicitor's letter dated 28 September 2020 made various requests including for the Ethics Committee proceedings to be in an open forum. Nevertheless, the first respondent's letter dated 28 September 2020 did reply to say that the applicant's requests including that for an open hearing were without merit and further replied *vide* letter dated 29 September 2020. It is the applicant's averment that the proceedings before the second respondent must be held in open since it involves the judicial institution of this country. Notwithstanding any provision in the JCE 2009 and JECA 2010, the proceedings against the applicant cannot be held *in camera* and/or behind closed doors especially when the complaints have been brought against the applicant and the applicant have requested for

proceedings to be conducted in open. On top of that, the matters relating to the complaints in the chairman's notice are in the public domain and the applicant wishes to be vindicated in open.

[17] The applicant also alleged that by the chairman's notice, the applicant have been placed in a position of great embarrassment and ridicule not only by other judges but also by the public at large. Accordingly, the proceedings before the second respondent be made public and the papers be served on various bodies. The applicant averred that he holds a public position and therefore the proceedings must be transparent and the international organizations related to rule of law must be fully appraised of the said proceedings. Additionally, the applicant also contended that the decision that proceedings are to be conducted *in camera* breaches provisions of the Federal Constitution, principles of natural justice and is an irrational decision.

[18] The applicant further contended that despite of explanation given as well as numerous objections raised and requests made by the applicant, the respondents maintain the decision to hold an inquiry to investigate further into the matter as stated in the first respondent's letter dated 28 September 2020. Consequently, the applicant filed this judicial review application to challenge amongst others the decision of the respondents in refusing the applicant's request for the proceedings to be heard in an open forum with access to the public, the constitutionality, composition and validity of the members of the second respondent to sit in the proceedings against the applicant and the validity of the chairman's notice dated 10 August 2020 together with Appendix A enclosed thereto.

The Findings Of The Court

[19] It is trite law that at the leave stage, the applicant must satisfy the court that there is an arguable case and the leave application is not frivolous. This well-established principle has been laid down in the case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478, whereby it was held as follows:

> [12] For purposes of its application the appellant had alluded to the statutory route of O. 53 of the Rules. Under this order two stages are anticipated, with the leave stage being the first, to be followed closely by the substantive hearing after successfully obtaining leave at the High Court. At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted (*IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617). In Malaysia, the Federal Court in *Mohd Nordin Johan v. The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 when allowing the appeal, opined that 'the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on

A a substantive motion for *certiorari*'. Without the need to go into depth of the abundant authorities, suffice if we state *that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though i.e unless the matter for judicial review is amenable* B *to judicial review absolutely no success may be envisaged.*

(emphasis added)

[20] In the case of *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627, His Lordship Edgar Joseph Jr FCJ wherein in Supreme Court C approved the following guidelines stated in *R v. Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] Crown Office Digest 109, Dip, the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:

D (i) The Judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law;

(ii) If the Judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review; E

(iii) If on considering the papers, the Judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the Judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That *inter partes* leave hearing should not be F anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the Judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award ... namely: if, taking account of a brief argument on either side, the Judge is satisfied that there is a case fit for further consideration, G then he should grant leave.

[21] The court is reminded that the threshold test for the grant of leave to issue judicial review is low but the applicant have to show that it is an arguable case which requires further deliberation by the court at the substantive stage. In the recent decision of the Court of Appeal in *Dato' Sri* H *Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal* [2020] 2 CLJ 73, it was held as follows.

(1) *The function of the court in exercising its power to grant leave to commence judicial review is to filter the application before it, i.e. to determine whether the application was not frivolous and vexatious, and that there is an arguable case* I *to merit further argument*. In dismissing the application to commence judicial review on the basis of the preliminary objection, the trial

judge failed to fully appreciate that there was no duplicity or multiplicity in proceeding. The High Court Judge erred in allowing the preliminary objection. The only burden the applicants needed to satisfy was the low threshold for leave to apply to commence judicial review. The applicants had succeeded in showing that there was an arguable case that merited the case to proceed for the substantive hearing.

(emphasis is added)

[22] In *Dato' Sri Mohd Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal* [2020] 2 CLJ 73; [2019] MLJU 1176, CA, Hasnah Mohammed Hashim JCA (as she then was) in her judgment states:

[32] The Court of Appeal in *R. v. Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] Crown Office Digest 109 laid down the guidelines which we find to be useful when considering an application for leave to commence judicial review:

(i) The Judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(ii) If the Judge is satisfied that there is no arguable case he should dismiss the application for leave to commence judicial review

(iii) If on considering the application, the Judge comes to the conclusion that she really does not know whether there is or is not an arguable case, the Judge can invite the putative respondent to attend and make representations as to whether or not leave should be granted. The test to be applied by the Judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, namely: if, taking account of a brief argument on either side, the Judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[33] A court hearing a judicial review application must determine whether "*prima facie* there is a genuine case for review". It is accepted that the threshold requirement is low, for leave will only be refused where an application is:

(i) frivolous and vexatious or hopeless;

(ii) made by busybodies with misguided or trivial complaints of administrative errors;

(iii) misconceived;

(iv) unarguable or groundless;

(v) where there is a more appropriate alternative procedure; or

(vi) where an application for judicial review is an inappropriate procedure.

[23] The procedure governing the judicial review application is provided under O. 53 of the Rules of Court 2012 (ROC 2012). Order 53 r. 2(4) ROC 2012 provides that only a "person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function" is entitled to make an application for judicial review. Nevertheless, for the court to exercise its judicial review power, there must be a subject matter for the court to review ie, a decision made by a decision maker or a refusal by him to make a decision. This principle can be seen in the Federal Court's case of *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490, whereby Raus Sharif FCJ (as he then was) in delivering the judgment of the court has elucidated as follows:

> It is trite law that the purpose of an order for *certiorari* is to quash the legal effect of a decision. In England, in the case of *Council of Civil Service Unions And Others v. Minister For The Civil Service* [1984] 3 All ER 935 the House of Lords held that *for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy*.
>
> We adopt the same view. Under the scheme of O. 53 of the RHC, only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review.

[24] Coming back to the leave application before this court, what is to be determined by this court at this stage is whether the applicant's application is not frivolous and there is an arguable case or otherwise. In answering this question, the court has categorised the issues and submissions raised by the parties into three main headings namely:

(i) "*Open Forum" v. "In Camera*";

(ii) validity of chairman's notice and constitutionality of Judges Ethics Committee; and

(iii) whether leave ought to be granted.

"Open Forum" v. "In Camera"

[25] In this judicial review application, the applicant sought to challenge the respondents' decision for the proceedings before the second respondent to be conducted *in camera* amongst others on the following grounds:

(i) The proceedings before the second respondent must be held in open since it involves the judicial institution of this country. Notwithstanding any provision in the Judges' Code of Ethics 2009 and Judges' Ethics Committee Act 2010, the proceedings against the applicant cannot be

held *in camera* and/or behind closed doors especially when the complaints have been brought against the applicant and the applicant have requested for proceedings to be conducted in open.

(ii) The matter relating to the complaints in the chairman's notice are in the public domain and the applicant wish to be vindicated in open.

(iii) By the said chairman's notice, the applicant been placed in a position of great embarrassment and ridicule not only by fellow judges but also by the public at large. Thus, the proceedings before the second respondent be made public and the papers be served on various bodies.

(iv) The applicant holding a public position and those proceedings must be transparent, and the international organisations related to rule of law must be fully appraised of those proceedings.

(v) The decision that proceedings are to be conducted *in camera* breaches provisions of the Federal Constitution, principles of natural justice and is an irrational decision.

[26] The Attorney General's Chambers however opposed to the applicant's contentions that the proceeding before the second respondent should be conducted in an open forum as the said decision to hold such proceeding *in camera* is in line with the provision of law ie, s. 8 of the JECA 2010 which stated as follows:

8. The proceedings of the committee shall be *in camera*

[27] The Attorney General's Chambers also argued that since the above provision negates any notions for the matter to be held in an open forum, thus the request for the same to be conducted in an open forum is against the provision of law and in consequence will render the proceedings null and void.

[28] In rebutting the Attorney General's Chambers arguments, the applicant contended that the word "shall" in the said provision is not mandatory but instead only directory in nature. As such, the argument whether the provision is mandatory or directory, whether it can override the rights of the applicant for an open hearing and whether the section itself is unconstitutional should be dealt with at the substantive stage.

[29] After careful consideration, the court is of the considered opinion that the applicant's argument that the determination of the word "shall" in s. 8 of JECA 2010 should be dealt with at the substantive stage is unsubstantiated. The reason being is that the word and/or phrase use in that particular section is clear, plain and unambiguous and should be construed as mandatory and not directory and hence, there is no need for this issue to be ventilated further at the substantive stage. To support this, the court needs to look at the true intention of the Legislature when enacting JECA 2010. The Judges' Ethics Committee Bill, 2008 had visibly provided as follows:

10. Clause 8 requires the proceedings of the committee to be conducted *in camera*.

[30] Further, in the Hansard (Malaysia, Perbahasan Dewan Rakyat, Bacaan Kali Kedua dan Ketiga, Rang Undang-Undang Jawatankuasa Etika Hakim 2008, 15 Disember 2009, 56-58) particularly on s. 8 of the JECA 2010, the relevant excerpt is reproduced as follows:

Fasal 8 - Pindaan:

> Tuan M. Kula Segaran [Ipoh Barat]: Terima kasih Tuan Pengerusi. Tuan Pengerusi saya membawa pindaan ini untuk mansuhkan fasal 8 dan digantikan dengan seperti berikut iaitu:
>
> "Semua prosiding jawatankuasa hendaklah terbuka kecuali sebagaimana pendapat jawatankuasa bahawa sesuatu prosiding tersebut menyentuh perkara keselamatan negara dan atau akan mengganggu gugat keselamatan saksi-saksi dan ahli jawatankuasa di dalam sesuatu prosiding. Maka prosiding tersebut hendaklah dijalankan secara tertutup (*in camera*)."
>
> Dengan izin the English;
>
> "All proceedings of the committee shall be open for public unless it is in the opinion of the committee that such proceeding involves matters of national security and cases where there are serious concerns as to the safety of witnesses and the committee itself then in such cases, the proceeding shall be *in camera*".

Tuan Pengerusi sebelum ini Yang Berhormat Menteri telah pun menjawab sedikit mengenai perkara tersebut. Mengatakan bahawa ini adalah dalam proses investigation. Itulah sebab kalau kita tengok cadangan saya, kalau sesuatu menunjukkan bahawa ada seriousness peribadi dan perkara-perkara berkaitan dengan etika sesuatu speciality hakim. Itu sepatutnya dalam camera. I don't have objection. Akan tetapi kalau itu untuk perkara yang umum kenapa ia tidak boleh diketahui oleh orang ramai? Kenapa this is macam kongsi gelap. Why should be hiding? It should be open.

Itulah sebab saya berpendapat saya katakan bahawa jangan kita adakan semua just of ... Semua di dalam camera. Memberi satu ruang kepada mereka untuk membuat keputusan sesuka hati mereka. Lagipun tidak boleh di challenge dan ini akan tidak membawa hasil yang bagus kepada semua berkenaan. Maka ini adalah cadangan saya bahawa seberapa yang boleh ia terbuka untuk orang ramai. Jika ada situasi yang tertentu maka ia boleh ditutup. Terima kasih.

Tuan Pengerusi [Datuk Dr. Haji Wan Junaidi Tuanku Jaafar]: Ahli-Ahli Yang Berhormat, masalahnya ialah bahawa pindaan sebagaimana yang tertera di dalam kertas pindaan yang telah dibentangkan oleh Yang Berhormat Ipoh Barat sekarang ini terbuka untuk dibahas.

[Tiada perbahasan]

Dato' Seri Mohamed Nazri bin Abdul Aziz: Tuan Pengerusi, pertamanya saya telah menjawab sebentar tadilah apa yang dibangkit oleh Yang Berhormat. Keduanya Tuan Pengerusi, etika ini ialah untuk kesalahan-kesalahan yang kecil yang tidak melibatkan kesalahan yang boleh sabit di bawah undang-undang. Jadi kesalahan-kesalahan kecil ini hendaklah diselesaikan secara tertutup. Kerana apa? Ini kerana kesalahan itu ialah seperti tidak buat ground superseding lambat kah ataupun benda-benda yang tidak melibatkan kesalahan besarlah yang boleh bersabit dengan kesalahan undang-undang. Kehakiman merupakan satu tempat yang kita pergi untuk mendapat keadilan. Maka oleh kerana itu adalah penting untuk kita menjaga sanctity kehakiman. Kalau sekiranya ianya dibuat secara prosiding yang terbuka maka apa yang akan berlaku ialah kecacatcelaan. Itu sudah pun diperlihatkan dan akan menyebabkan orang yang hendak mendapatkan keadilan di hadapan hakim berkenaan yang akan balik bertugas akan hilang keyakinan.

[Tuan Yang di-Pertua mempengerusikan Jawatankuasa]

Ini sebab orang semua tahu dia ini memang tidak buat ground superseding dan macam-macam lagi. Jadi orang hilang confident keyakinan. Mungkin juga boleh menjadi bahan di dalam perbicaraan itu sekali sekala peguam akan boleh buat insinuation yang mungkin mendatangkan perasaan hina dan diperendahkan terhadap hakim berkenaan. Jadi sebab itu saya rasa daripada pihak kerajaan kita tidak bersetuju kerana ini merupakan kesalahan yang kecil dan yang boleh dihukumkan secara internal. Lebih penting ialah hakim itu akan balik bekerja dan kita perlu memastikan iaitu supaya beliau tidak akan menjadi sumber insinuasi dan lain-lain lagilah. Jadi sebab itu kerajaan tidak bersetuju dengan cadangan yang telah dibuat oleh Yang Berhormat Ipoh Barat.

Tuan Yang di-Pertua: Ahli-ahli Yang Berhormat, masalahnya ialah bahawa pindaan yang dicadangkan oleh Yang Berhormat Ipoh Barat seperti mana yang dicadangkan sebagaimana yang dinyatakan dalam kertas pindaan hendaklah dipersetujukan.

Pindaan dikemukakan bagi diputuskan, dan tidak disetujukan.

Fasal 8 diperintahkan jadi sebahagian daripada rang undang-undang.

(emphasis added)

[31] Therefore, based on the Bill and Hansard, it is clear that the intention of the Legislature was to have the proceedings of this committee be conducted *in camera*. The Legislature had stressed that committee proceedings shall be *in camera* and not to be opened to public in order to maintain judicial sanctity.

[32] In *Hee Nyuk Fook v. PP* [1988] 1 LNS 15; [1988] 2 MLJ 360, SC the Supreme Court provides a guideline in determining whether the word "shall" provided in a provision is to be construed as mandatory. It was held that it largely depends on the intention of the Legislature, the facts and

A circumstances of the case and also the injustice that it would bring in interpreting the provision in a certain way. In this particular case, it was regarding to s. 158(2) of the Criminal Procedure Code (CPC). The Supreme Court held that:

> The question that arises is whether section 158(ii) is mandatory or
B directory. In our view, the word 'shall' appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the
C provision one way of the other (see *Interpretation of Statutes*, 7th Ed, p 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order whether the matter is imperative or only directory (see
D *Howard v. Bodington* (1877) 2 PD 203 at p 211).
>
> Applying the test to the facts and surrounding circumstances of the case, we hold that in so far as this case is concerned, the provision of s. 158(ii) is not imperative but directory. The provisions contained therein only lay down a rule of procedure and do not relate to the mode of trial.

E **[33]** In *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122, SC held that:

> The Court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the Court must
F endeavor to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded.

[34] In *Krishnadas Achutan Nair & Ors v. Maniyam Sanykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94, FC, it was held that:

G The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in
H a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:

> > As a general rule a court will adopt that construction of a statute which will give some effect to all of the words which it contains. (Per Gibbs J in *Beckwith v. R* (1976) 12 ALR 333 at p 33.)

I **[35]** Relying on the cases cited above and the principles as enunciated therein, whether the expression "shall" in a particular legislation is mandatory in nature or merely directory depends upon the intention of the

Legislature in question. It is determined by looking at the whole context of the statute to be construed. The use of the expression "shall" would not by itself make a provision of the Act mandatory. It is to be construed with reference to the scheme of the statute and the context in which it is used.

[36] Applying the principles in *Hee Nyuk Fook v. PP* (*supra*), from the Hansard, it is clear that the intention was to have the committee proceeding be held *in camera*. Hence, once again, the court would like to emphasise that it is the considered opinion of this court that the word "shall" in s. 8 of the JECA 2010 must be interpreted as being mandatory. Any other meaning would create an absurdity and would be contrary to what was intended by the Legislature despite the applicant's wish to be vindicated in an open forum as one's wish cannot supersede the provision of law.

[37] Further, if we look at s. 9 of JECA 2010, it is provided that the disciplinary proceedings of the committee shall not be a trial but an enquiry as regards the breach of any provisions of the Code of Ethics committed by a judge referred to it by the Chief Justice of the Federal Court.

> Enquiry
>
> 9. (1) The proceedings of the committee shall not be a trial but an enquiry as regards the breach of any provisions of the Code of Ethics committed by a judge referred to it by the Chief Justice of the Federal Court.

Therefore, this court is of the view that likewise any other disciplinary proceedings, such enquiry should be done domestically and/or internally in accordance to the relevant laws which regulates such proceedings ie, in this case JECA 2010. In such circumstances, the applicant's contention does not hold water.

[38] The applicant's contention that since the Government had announced that the matter exposed in the impugned affidavit should be heard before an RCI and that the said matter has become public domain, thus it needs to be heard in an open forum is misconceived. This is because the proceedings before the second respondent is to probe into the complaints lodged against the applicant for allegedly breaching the JCE 2009 and not to investigate the merits of the applicant's revelation in the said impugned affidavit and the applicant's comments and/or remarks in the impugned judgment.

[39] The applicant also submitted that if the court feels that his judgment goes beyond what is acceptable, then the court ought to expunge the said disparaging remarks from his judgment and not taken a disciplinary action against him. This court however cannot appreciate the argument submitted by the applicant on the grounds that for the court to take such action to expunge the said disparaging remarks, the court needs to be moved by the parties in the said suit. If the same is not brought up during the appeal at the Federal Court, then the court cannot out of its own motion, suddenly expunge the said remarks from the judgment.

Validity Of Chairman's Notice And Constitutionality Of Judges Ethics Committee

[40] The applicant also submits that it would be highly prejudicial, procedurally incorrect and a breach of natural justice to allow members of the second respondent who were part of the panel that heard the appeals in *Anwar Ibrahim* and *Karpal Singh* and/or had any nexus to cases involving Anwar Ibrahim and Karpal Singh, to now sit and decide upon a complaint against the applicant.

[41] According to the applicant, he had made statements in the impugned affidavit (specifically paras. 7, 8, 10, 22, 41, 42, 43) which raised issues regarding some members of the current members of the second respondent and these members are clearly conflicted as they have nexus to the subject matter of the proceedings.

[42] Further, the applicant claims that he is a "whistleblower' judge in the impugned affidavit. He has *inter alia* stated that there was unlawful interference in these cases. Thus, these very same panel members ought not to sit in the second respondent and be judges in their own course (*nemo judex in causa sua*). Consequently, the applicant claims that the continuance of these panel members of the second respondent to sit to determine the charges in the chairman's notice is highly prejudicial, procedurally incorrect and a breach of natural justice, whether there is bias or perceived bias.

[43] Through careful observation, the court found that the impugned affidavit (specifically paras. 7, 8, 10, 22, 41, 42, 43) did not mention specifically the judges' name. The applicant's affidavits also did not mention the conflicted judges' name. Therefore, the court is of the view that this objection by the applicant is unjustifiable since it has not specifically mentioned the judges who have the conflict of interest as claimed. Further, the applicant has the onus to prove his facts which he asserts. The issue of bias must therefore be proven. The applicant cannot be on a fishing expedition trying his luck to any shot just to disqualify the committee members. He must prove those facts really exist.

[44] More importantly, s. 101 of the Evidence Act 1950 (EA) provides for the basis of a legal burden as follows:

> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[45] In *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86 (FC), Salleh Abas FCJ (as he then was), delivering the judgment of the court, said that the first sense of the expression 'burden of proof' in s. 101 of the EA is the burden to establish the case which rests throughout

on the party who asserts the affirmative of the issue, while the second sense of the expression "burden of proof" in s. 102 of the EA is the burden to adduce evidence:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v. Jatashankar Dossa & Ors* AIR 1961 SC 1474 1748 and *Raghavamma v. Chenchamma* AIR 1964 SC 136-143). The first sense, signified by the expression burden of proof such as referred to in s. 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* 7th Ed, paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss. 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

[46] In *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697 (FC), it was held that the respondent, who was the plaintiff, had both the "burden of proof" to make out a *prima facie* case as well as the initial onus of proof to adduce evidence to prove the claim. The onus of proof would only shift to the appellants if the respondent had made out a *prima facie* case. That remained so even though forgery was pleaded. The Federal Court stated as follows:

> [54] s. 101(1) provides that 'Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist'. 'Section 101 states that the initial burden of proving a *prima facie* case in his favour is cast on the plaintiff ...' (Woodroffe and Amir Ali, *Law of Evidence* (19th Ed Vol 3) at p 3194). Illustration (b) to s. 101 puts it beyond doubt that the 'burden of proof' rests throughout on the plaintiff. Section 102 provides that 'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'. 'The initial onus of proving the case is always on the plaintiff' (*Sarkar Law of Evidence* 16th Ed at p 1593). Illustration (a) to s. 102 puts it beyond doubt that a plaintiff has the initial onus of proof.

A [55] But 'when (the plaintiff) gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant, to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage, in the course of the evidence, the onus shifts from one side to the other. When after the entire evidence has been B adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden, but if it has, on the evidence, no difficulty arriving at a definite conclusion, then the burden of proof on the pleading recedes into the background' (*Woodroffe and Amir Ali*, at p 3194; see also *Abrath v. The North Eastern Railway Company* at p 452). '... the onus of proof C may shift ... but the question must ultimately arise whether the person who is bound to prove the affirmative of the issue ... has discharged ... that burden' (*Jane Wakelin v. The London and South Western Railway Company* (1886) 12 App Cas 41 per Lord Halsbury LC) or proved 'his case sufficiently to justify a judgment in his favour' (*Stoney v. Eastbourne Rural District Council* [1927] 1 Ch 367 at p 397 per Lord Hanworth MR). D

[56] Thus, a plaintiff has both the burden of proof as well as the initial onus of proof. In *Britestone Pte Ltd v. Smith & Associates Far East, Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA, delivering the judgment of the court, explained that at the start of the plaintiff's case the burden of proof and the onus of proof coincide: E

> ... at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case F may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of the relevant fact would have been G discharged by the plaintiff. The legal burden of proof – a permanent and enduring burden – does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. Sometimes, the legal burden is spoken of, inaccurately, as 'shifting'; but what is truly meant is that another issue has been engaged, on which the opposite party hears the H legal burden of proof.

[57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit, non qui negat, Actori incibit probation* ... The plaintiff is bound in the first instance, to show a *prima facie* case, and if he leaves it imperfect, the court I will not assist him. Hence the maxim *Potior est condition defendantis*. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced

by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a *prima facie* case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor*' (*Woodroffe and Amir Ali*, Vol 3 at pp 3190-3191).

[58] 'The party on whom the *onus probandi* lies ... must begin' (*Woodroffe and Amir Ali*, Vol 3 at p 3192). 'The strict meaning of the term *onus probandi* is this: that if no evidence is given by the party on whom the burden is cast, the issue must be found against him' (*Woodroffe and Amir Ali*, Vol 3 at p 3189). 'The principle that the party who asserts the affirmative in any controversy ought to prove his assertion, and that he who only denies an allegation may rest on his denial, until, at least, the probable truth of the matter asserted has been established, is one which has received the widest recognition. The reason is obvious: to all propositions, which are neither the subject of intuitive or sensitive knowledge or probabilised by experience, the mind suspends its assent until proof of them is adduced or as it has been said: 'Words are but the expression of fact; and therefore, when nothing can be said to be proved'; which is found is probably what is meant by the maxim *per rerum naturam, factum negantis probatio nulla est*' (*Woodroffe and Amir Ali*, Vol 3 at pp 3190-3191).

[59] 'The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party if no evidence at all being given, the burden being, of course, on the adverse party' (*Woodroffe and Amir Ali*, Vol 3 at p 3203). That test is codified in s 102. 'The best tests for ascertaining on whom the burden of proof lies, are to ascertain first which party would succeed if no evidence were given on either side; and secondly, what would be the effect of striking out of the record the allegation to be proved. The onus lies on whichever party would fail, if either of these steps were pursued' (*Sarkar* at p 1590).

[47] Applying the principles laid down in the abovementioned cases, the applicant therefore has the burden as well as the onus of proof to prove the facts which he asserts. In short, the applicant must prove those facts really exist. On this point, the court agrees with the Attorney General's Chambers' submission that the issue is a non-starter. The first respondent is the chairman of the second respondent in which by virtue of s. 5(2) of JECA 2010, the Chief Justice of the Federal Court shall be the chairman. Section 5(2) of JECA 2010 provide as follows:

(2) The Chief Justice of the Federal Court shall be the chairman of the committee, unless he is the complainant, in which case the next senior judge shall be a chairman.

[48] In the matter before this court, the complainants are other judges. As such, there is no hindrance for the first respondent to preside as chairman of the second respondent in the said enquiry proceedings. Further, even if the applicant's claim come out to be true, s. 10 of JECA 2010 provides the procedure for such conflict of interest to be disclosed and recorded in the

proceedings and the members of the second respondent, including the first respondent, who has made such disclosure, shall not take part in the deliberation or decision made by the second respondent. From the clear wording of s. 10 of JECA 2010, the court is of the considered opinion that the proper forum for the members of the second respondent to disclose any conflict of interest should be done in the proceedings before the second respondent itself and for the applicant to move this court in this application to remove the first respondent from the composition of the second respondent is a total misconception, since this court is not the proper forum to do so.

Section 10 of JECA 2010 states as follows:

> 10. Disclosure of interest
>
> (1) If the chairman or any member of the committee has a direct or indirect interest in any disciplinary proceeding, he shall disclose to the committee the fact of his interest and the nature of that interest.
>
> (2) A disclosure under subsection (1) shall be recorded in the minutes of the proceeding in which the disclosure was made and, after the disclosure, the chairman or the member shall not take part in the deliberation or decision of the committee.

[49] Likewise, the challenges brought by the applicant against the composition of the second respondent particularly towards other members of the committee could not stand on the same grounds as stated above. In fact, the appointment of the members of the second respondent is in accordance with s. 5(1) of JECA 2010.

Section 5(1) – Membership of the committee

> 5. (1) The committee shall be in odd numbers and shall consist of persons who hold or have held office as the President of the Court of Appeal, Chief Judge of the High Court in Malaya, Chief Judge of the High Court in Sabah and Sarawak, judge of the Federal Court, the Court of Appeal or a High Court as the Chief Justice of the Federal Court thinks fit to appoint.

Whether there is a conflict of interest amongst the members of the second respondent against the proceedings brought before the second respondent is totally a different issue that should be disclosed by the particular members and not to be determined by this court.

[50] Further, the constitution and the composition of the second respondent is in accordance with the Federal Constitution, JECA 2010 and JCE 2009. Article 125(3A) of the Federal Constitution provides:

> (3A) Where a judge has committed a breach of any provisions of the code of ethics prescribed under Clause (38) but the Chief Justice is of the opinion that the breach does not warrant the judge being referred to a tribunal appointed under Clause (4), the Chief Justice may refer the judge to a body constituted under federal law to deal with such breach.

[51] Additionally, JECA 2010 empowers the Chief Justice of the Federal Court to act as a chairman (first respondent). The Act provides that the first respondent to examine the complaint lodged against the judges except in the situation that the first respondent herself is a complainant. The said Act also empowers the first respondent to appoint and constitute the second respondent as provided under s. 5 of JECA 2010. By virtue of s. 4 of JECA 2010, the respondents are given jurisdiction to decide on the complaints against the judges other than their removal from the office. Section 4 of JECA 2010 provides:

> Jurisdiction of the committee
>
> 4. The committee shall have jurisdiction in matters relating to the conduct and discipline of all judges other than the removal of a judge from office under Clause (3) of art. 125 of the Federal Constitution.

Charges Or Facts

[52] On a different note, the applicant in his affidavit claims that the respondents have acted *ultra vires*/beyond the power conferred upon them by the statutes by issuing the chairman's notice with the 'charges' as particularised in Appendix A to the chairman notice dated 10 August 2020. The applicant contended that the respondents have proceeded to act with over zealousness and has proceeded not just to state the facts of the alleged breaches of the Code but have framed what appears to be charges going beyond substance of the two complaints in Appendix A. The applicant further argued that notwithstanding the word used by the respondents, the court should look at the substance since those facts stated in Appendix A take the form of charges.

[53] According to the applicant, the glaring example of the Appendix A is a charge; that the applicant delivered a judgment in favour of an appellant in a 2014 case, who was represented by one Arun Kasi as counsel, and alleging that the applicant is perceived to have an abnormally close connection with Arun Kasi, which is a breach of s. 8(2) of the Judges' Code of Ethics 2009. It was further contended by the applicant that such facts do not appear in the two complaints letters of the complainant, but a creation of the respondents who were not only acted as prosecutor but also become a complainant. The respondents had formulated the charges in the chairman notice, Appendix A and came up with additional charges not in the original complaints.

[54] In answering this issue, the court must determine what is mean by "charge". According to Merriam-Webster.com Dictionary, Merriam-Webster, https://www. merriam-webster. com/dictionary/charge, legal definition of charge is to make an accusation against especially in order to bring to trial or to allege especially as an accusation.

[55] In *Birich Bhivan v. State of Bihar* AIR 1963 SC 1120, AIR 1963 SC 1123, Justice K Subbarao summarily described charge as an accusation made against a person in respect of an offence alleged to have been committed by him. The court held as follows:

> The word "charge" is defined in s. 4(c). It says that the charge includes any head of a charge where charge contained more heads than one. This definition does not throw any light, but it may be noted that that is only an inclusive one. Chapter XIX provides for the form of charges and for joinder of charges. Section 221 to 232 give the particulars that a charge shall contain and the manner of rectifying defects if found therein. Section 221 says that in every charge the court shall state the offence with which the; accused is charged. Section 222 provides that the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom or the thing in respect of which it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 233 repeats that a charge shall also contain such particulars mentioned in ss. 221 and 222. The form of a charge prescribed in Schedule 5 shows that it contains an accusation that a person committed a particular offence. It is, therefore, clear that a charge is not an accusation made or information given in abstract but an accusation made against a person in respect of an act committed or omitted in violation of a penal law forbidding or commanding it. In other words it is an accusation made against a person in respect of' an offence alleged to have been committed by him.

[56] Summarily, a charge is a notice to the accused of the matter that he is accused of and it is an information to the court of the matters to which evidence is to be directed. (*Humayoon Shah v. R* (21) WR 72, cited in *Mejar Ali Zaman Ali Hassan v. Capt Abdul Kadir & Anor* [1989] 2 CLJ 643; [1989] 2 CLJ (Rep) 117; [1989] 3 MLJ 32).

[57] The law on charges is found in ss. 152 to 172 of the Criminal Procedure Code (CPC). Sections 152 to 154 of the CPC specifically encompass provisions regulating the form of a charge, the essentials as to time, place and person to be included and the manner of committing the offence. The relevant provisions of ss. 152-154 of the CPC are reproduced as follows:

> 152 Form of charge
>
> (1) Every charge under this Code shall state the offence with which the accused is charged.
>
> (2) If the law which creates the offence gives it any specific name the offence may be described in the charge by the name only.
>
> (3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) ...

153. Particulars as to time, place and person

(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) ...

154. When manner of committing offence must be stated

When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[58] Now, to appreciate whether Appendix A contained mere facts or charges as alleged by the applicant, this court refers to the alleged breaches as in the said Appendix A (exh. "A-2" applicant's affidavit in support, encl. 2 at pp. 23 until 30) attached to the notice issued by the first defendant to the applicant which listed down the alleged violations of the JCE 2009 as follows:

FACTS OF THE ALLEGED BREACHES

1. Pursuant to paragraph 14(1)(a), you are hereby informed of the facts alleging your breaches of the Code. All abbreviations in the body proper of the notice are adopted herein.

Paragraph 6(1) of the Code

2. According to paragraph 6(1) of the Code, a judge shall act at all times in a manner that promotes integrity and impartiality of the judiciary. The allegations in respect of the breach of this provision of the Code are twofold.

Violation 1

3. The averments made in your Affidavit, which were eventually made public, may breach paragraph 6(1) of the Code. The offending portions are paragraphs 10-12,15-17, 21, 24, 27-28, 31, 35, 38-39, 47, 49, 50-53, 55, 57, 60-61, 64, 69, 70-73, 76, 85, 91-92, 96, 98, 100-102, 105-107, 109-110. 113-114, 126, 136-140, 142-143 and 147-148. These essence of these paragraphs may be summarised as follows:

(a) that Malaysian judges generally lack integrity;

(b) Malaysian judges are morally and intellectually corrupt;

(c) Malaysian judges tailor their decisions and judgments towards promotion;

(d) many Malaysian judges have or do conspire with politicians either to advance a certain aim, or have or do connive to allow acts of corruption to continue; and that

(e) based on the above, Malaysian judges are not impartial and decide cases for an ulterior motive.

4. Taking the above collectively, you have brought the name of the Judiciary into disrepute by creating the impression that the Judiciary is infected with corruption and that the judges are bearers of injustice.

5. In so doing, you have failed to promote the integrity and impartiality of the Judiciary in breach of paragraph 6(1) of the Code.

Violation 2

6. Further, in relation to paragraph 6(1) of the Code, you as recently as 17 June 2020, published a judgment in the case of *Public Prosecutor v. Aluma Mark Chinonso And Other Appeals* [Criminal Appeals No. B-05(LLB0-449-09/2018 and B-05(M)-453-09/2018] ('Judgment') which concerned two appeals against the decision of the High Court in respect of charges against two separate accused persons for drug trafficking under section 39B of the Dangerous Drugs Act 1952. In a manner completely unrelated to the appeals, you purported to lambast the Judiciary for abusing judicial power by exercising its power of contempt to stifle free speech.

7. Paragraphs 43-49 of the Judgment are particularly glaring where you made reference to "media persons" and "advocates.

8. The only "advocate who was recently cited for scandalising contempt is one Mr Arunachalam a/l Kasi ('Arun Kasi'). See *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener)* [2019] 6 CLJ 1. As the facts will show later on, you are perceived as having a very close connection to the said Arun Kasi.

9. It is quite obvious that "media persons", refers to presently ongoing contempt proceedings initiated by the Attorney General against Mkini Dotcom Sdn Bhd, the parent company of the online news portal known as "Malaysiakini. Leave to initiate contempt proceedings was granted on 17 June 2020 which is the same date when your judgment was published. Further, on 21 June 2020 Malaysiakini, published an article highlighting your views in the Judgment.

10. Collectively taken, these facts point to a breach of paragraph 6(1) of the Code.

Paragraph 6(2)(b) of the Code

11. Paragraph 6(2)(b) of the Code requires that a judge shall not lend the prestige of his judicial office to advance his or others' private interest.

12. An analysis of your affidavit suggest that you abused the prestige of judicial office to advance your own private interest. There are certain paragraphs in the Affidavit wherein you may be seen to promote yourself, your jurisprudential views of judgments. The overall impression is that you attempted, as a sitting Judge, to enhance your prospects of elevation to the Federal Court.

13. The relevant portions of the Affidavit are paragraphs: 18, 20,30-31, 35,36, 74-75, 76, 80, 87, 118, 119, 126, 142 and 150.

14. The above paragraphs of the Affidavit when read collectively and in context, indicate that you meant the following:

    (a) That you hold various degrees and have authored many books and articles;

    (b) Other judges of the Federal Court are incapable of being Federal Court Judges as they are single degree holders; and

    (c) That you have written many landmark judgments and that you are perhaps the only judge to have written judgments protecting public interest.

15. The abovementioned inferences leave the impression that you, as a sitting Judge, abused the Affidavit as an opportunity to market yourself, in potential breach of your ethical obligation under Paragraph 6(2)(b) of the Code.

Paragraph 7(6) of the Code

16. According to paragraph 7(6) of the Code, a judge shall not disclose or use any non-public information acquired in his judicial capacity for any purpose unrelated to his judicial duties.

17. Deliberations and discussions by judges during decision-making process are confidential. You revealed the content of judicial deliberations and exchanges which might have been made during the decision-making process. This is discernible by reading the Affidavit as a whole.

18. Specifically, your averments purport to reveal and recount certain confidential information in respect of deliberations in the *Indira Ghandi* and *Karpal Singh* cases (regardless of whether the contents of such discussions are true or not). The alleged disclosure was of non-public information acquired by you in your judicial capacity and for a purpose unrelated to your judicial duties.

19. This is in breach of paragraph 7(6) of the Code.

Paragraph 7(8) of the Code

20. The facts adumbrated above also constitute a breach of paragraph 7(8) of the Code i.e that a judge "shall not conduct himself in a manner which is not befitting of a judge". In paragraph 35 of your Affidavit, you said: "judgments of other judges which nowadays are largely a 'cut and paste' of submissions of counsels and judgments of court below ..." At paragraph 36 of the same, you claimed that the majority of other judges lack integrity.

21. An analysis of the following judgments of yours indicate that you are culpable of the very thing you alleged in paragraphs 35 and 36 of the Affidavit, i.e cutting and pasting. The cases also show that you are not averse to promoting your own books and jurisprudential views in an undignified manner. These judgments include:

	No. Judgment	Comment
	1 *Elitprop Sdn Bhd v. Yeo Ping Tieng & Ors And Another Appeal* [2017] 2 MLJ 572	In this judgment, you copy and paste the submission of counsel and judgments of the other Courts.
	2 *Bar Council Malaysia & Anor v. Judy Blacious s/o AF Pereira* [2017] 1 MLJ 670	In these cases, you quoted your own publications in your judgments, which indicates element of self-promotion.
	3 *Munusamy Sundar Raj v. Public Prosecutor* [2013] 5 MLJ 48	
	4 *Chin Kek Shen v. Public Prosecutor* [2013] 5 MLJ 827	

Paragraph 8(2) of the Code

22. Paragraph 8(2) of the Code requires a Judge to "avoid close association with individual members of the legal profession ... where such association might give rise to a reasonable suspicion or appearance of favouritism". This concerns your association with the said Arun Kasi.

23. In the case of *International Bulk Carriers Spa v. CTI Group Inc* [2014] 6 MLJ 851, you delivered judgment in favour of the appellant. Counsel for the appellant was Arun Kasi.

24. The evidence further suggests that you are perceived to have an abnormally close connection with Arun Kasi. He runs his own law firm i.e Messrs. Arun Kasi & Co. Arun Kasi penned an open letter dated 20 November 2018 to the Prime Minister, YAB Tun Dr. Mahathir, complaining about the "judiciary's lack of meritocracy", and lamenting about your non-elevation to the Federal Court ('Letter'). Paragraphs 3 and 4 of the Letter mirror paragraphs 30, 36, 86 and 87 of your Affidavit.

25. The contents of the letter have been carried by the Malay Mail at https://www.malavmail.com/news/malavsia/2018/11/20/claiming-insult-to-meritocracy-lawyer-asks-why-senior-judge-skipped-for-pro/1695297.

26. Further, it is also apparent from a search of Arun Kasi's firm's website that he has produced works, for example a book on 'University cum Court Annexed Arbitration' in collaboration with you. Arun Kasi also gave a televised interview with Bernama on 18 February 2019 supporting and repeating your allegations in the Affidavit.

27. The above is also to be read in relation to your reference to 'advocates' in your Judgment.

28. The above, when read as a whole and in context, finds you in breach of paragraph 8(2) of the Code.

[59] Reverting back to the issue herein, the court is of the view that Appendix A of the chairman's notice dated 10 August 2020 is for the facts of the alleged breach of the JCE. It is not a charge or charges as claimed by the applicant due to two main reasons. The first reason is because of the heading of the Appendix A itself. The heading clearly indicated "Facts Of The Alleged Breaches". Visibly and obviously, Appendix A in the chairman's notice dated 10 August 2020 was prepared as for the facts of the alleged breach of the JCE which is in line with para. 14(1)(a) of the JCE 2009. Paragraph 14(1)(a) provides:

14. (1) If it is determined under paragraph 13 that a judge be referred to the committee, the committee shall:

(a) Inform the judge in writing the facts of the alleged breach of this Code.

[60] The court is of the view that if Appendix A were charges, the heading will be "Charges" not "Facts Of The Alleged Breaches". Therefore, the court could not agree with the applicant's contention that the respondents go beyond their power in drafting charges against the applicant. Further, this court cannot in any way make any other interpretation other than what has been clearly and precisely stated in the said notice ie, "Facts Of The Alleged Breaches".

[61] The second main reason is those facts do not in any way form a charge. In other words, it did not comply with the requirements provided under the CPC in order to form a charge. As clearly provided in the CPC, a charge must include the details of time, place, person or thing against whom the offence is committed and the manner of committing the offence. A charge, and especially a charge in a complicated case, should be accompanied by particulars of the acts complained of as constituting the crime charged when the mere mention of the time, place, persons and crime are insufficient to explain by what means the crime was committed (*PP v. Teoh Choon Teck* [1962] 1 LNS 141; [1963] MLJ 34).

[62] Referring to violation 1 in the Appendix A, it is observable that it did not contain the details of time, place and the people involved specifically. This clearly did not comply with the requirement of how a charge should be. It is purely facts of the alleged breaches, not a form of a charge. Thus, the chairman's notice dated 10 August 2020 as well as Appendix A have been validly issued by the respondents and are in accordance with law.

Whether Leave Ought To Be Granted

[63] An application for judicial review is a particular procedure by which an aggrieved person can seek to review a public authority's decision, with judicial review referring to the power to supervise the activities, inclusive of the latter decision. Express statutory power is vested in the High Court by the Courts of Judicature Act 1964, the Specific Relief Act 1950 and the Rules of Court 2012 to deal with this supervisory power.

[64] The basis of the application will be based on principles of public law. The function of the court is to see that lawful authority is not abused by unfair treatment. Order 53 r. 3(1) of ROC 2012 necessitates the obtaining of leave, as no application for judicial review may be made unless leave has been granted. It is trite law that the decision that ought to be challenged by way of judicial review proceedings must be final in nature which affects the rights of a person.

[65] In *Lee Kok Wai & Anor v. Securities Commission Malaysia* [2015] 4 CLJ 260, where one of the issues involved was whether the application was premature as there was no reviewable decision. Asmabi Mohamad J (as she then was) held that:

> (iii) Upon perusal of the relevant provisions of Act 498 it would appear that the AOB is entrusted under the law to conduct an inquiry in order to ascertain if any person under its supervision had contravened or failed to comply and/or observe the provisions of Part 111A – Audit Oversight Board or the conditions imposed under sub-s. 310(4) or any written notice or guidelines imposed or issued by the SC;
>
> (iv) In the case at hand, the AOB had conducted inquiries and issued notices to show cause as part and parcel of the whole investigative process. It had not made any "decision" and/or imposed any sanctions yet. The investigative process was still in progress at the time the notice to issue show cause pursuant to s. 31Z(5) of Act 498 was issued. As such there was no "decision" made by the AOB as the whole investigative process was still in progress and had not been completed. It is only when the AOB makes its decision under s. 31Z(2) of Act 498 after considering the explanation given by the applicants pursuant to s. 31Z(5) of Act 498 could the AOB be said to have completed its task under the Act 498. It is only at this point the applicants could file the application for leave to review the decision made by the AOB;

(v) The decisions of the courts in cases such as *City Growth Sdn Bhd & Anor v. The Government of Malaysia* [2005] 7 CLJ 422; [2006] 1 MLJ 581; *R v. Sloan* [1990] 1 NZLR 474; *Datuk Ishak Ismail v. Securities Commission* [2011] 8 CLJ 208; *Deeb v. IIROC* 2012 ONSC 1014; *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; *Ahmad Azam Mohamad Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia* [2004] 4 MLJ 86; *Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [1999] 3 CLJ 242; [1999] 3 MLJ 110 had thrown some lights on how the courts should approach the subject matter. It had been illustrated by the above cited cases that not all decisions and actions of the public officer are reviewable by the court. In dealing with the application for judicial review, involving the investigative process and/or deliberations which form part and parcel of the regulatory functions of the agency the courts would be reluctant and/or slow to grant the relief in the form of judicial review. This is due to the reason that the court would be reluctant to open the floodgate and expose these statutory bodies to constant judicial review as to do so would impede these bodies from exercising their regulatory functions efficiently. The AOB in this case should not be hindered from proceeding with the investigation or deliberations process, which the AOB is entrusted by the law to perform. Therefore, the AOB must be given the leeway to perform the tasks entrusted by the law without any interference;

(vi) In determining whether the "decision" was reviewable, the court would have to examine if the issuance of the notice to show cause was part of the AOB's duty to carry out the investigation or inquiry and/or whether there were ongoing proceedings before it. Once there was determination and/or final determination of the issues arising from the inquiry, only at this point the applicants would be at liberty to apply for judicial review to quash the said decision;

(vii) In view of the above the notice to show cause did not qualify as a "decision" within the context of O. 53 r. 2(4) RoC as the said notice did not constitute a conclusive determination of the applicants' rights or obligations and/or deprived the applicants of the benefits they were entitled under Act 498. In the absence of a final determination by the AOB affecting the rights of the applicants could not be said to be adversely affected by the notice to show cause dated 5 September 2014 issued by the SC; and

(viii) Based on the aforesaid the applicants before me were not able to demonstrate a *prima facie* case. That is taken to mean that the applicant had not demonstrated the existence of a *prima facie* case for which further arguments were warranted at the full *inter partes* hearing.

[66] In *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698; [2009] 4 MLJ 695, CA, it was held that neither was it shown that ultimately the decision of the listing committee would lead to a predetermination of the matters pending in the criminal trial. As such, the respondent had failed to raise an arguable case and it would appear on the facts that the respondent had acted prematurely on his part. Heliliah JCA held that:

> [34] It is found at the stage of the application for leave GBA is unable to establish what parts of the material overlap which would form part of the materials in the criminal proceeding would also be part of the deliberations of the enforcement proceedings such that there would also be publications of the subject matters of the deliberation. In other words the court is being invited to embark on a form of investigative journey into the materials which are likely to be placed before the deliberations of the LC as well as the criminal proceedings. Matters before the LC relate to the issue of delay. The court in the pending criminal proceeding based on the charge will consider essentials of what constitute 'making misleading statements'. The respondent has not shown that there is here a situation where a court and the LC would contemporaneously be considering the same or identical issues in a manner that one would affect the evaluation in the other. There are suggestions that the LC subsequent to its deliberation would be expected to issue publications such that GBA will be prejudiced in facing the trials. At this stage the assertions are conjectural in nature. Neither is it shown that ultimately the decision in the LC would lead to a predetermination of the matters pending in the criminal trial. Neither prejudice nor the perversion of justice is indicated.
>
> [35] There is therefore here a considerably premature action on the part of GBA. In our view GBA has failed to raise an arguable case. Even assuming it is otherwise there is the related question whether Bursa in its decision to proceed with its statutory duty of conducting the enforcement proceedings is amenable to judicial review.
>
> ...
>
> [61] In this appeal the order for stay has been made in respect of an internal body of the Bursa which has not even embarked on its deliberation. The LC of the Bursa is just about to commence a process of deliberations and which is expressly allowed within the framework of the Bursa itself.
>
> [62] It has been indicated above that the GBA has failed to raise an arguable case as the vein of his application is solely grounded on the alleged application of the *sub judice* rule. The court would be embarking on a process of rewriting a subsidiary legislation namely the RHC if it were to permit an interpretation of the words 'proceedings in question' to be applicable to an internal decision making process made by Bursa to convene a committee to deliberate on the non-compliance by GBA of the LR of the Bursa. There is here a serious and clear misdirection in the exercise of a discretion which warrants appellate interference. It would

spell an excess of power if 'stay of proceedings' in this appeal would be extended to the internal deliberations of the Bursa being a commercial entity vested with regulatory measures in the capital market. Once again nothing has been alleged of illegalities but merely unsubstantiated allegations of prejudice amounting to an abuse of process in seeking the court's intervention.

[67] It is important to note that the procedure for the enquiry proceedings against the applicant is envisaged under paras. 13 and 14 of JCE 2009 which provides as follows:

Chief Justice to determine nature of breach of this Code

13. (1) Where a complaint is received under paragraph 12 and the Chief Justice is of the opinion that the complaint has no merit, he may dismiss it after consulting the President Court of Appeal if the judge complained of is a judge of the Court of Appeal, the Chief Judge of the High Court in Malaya if the judge complained is of a judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak if the judge complained of is a judge of the High Court in Sabah and Sarawak.

(2) If the Chief Justice is of the opinion that the breach does not warrant the judge be referred to a tribunal appointed under Clause (4) of art. 125 of the Federal Constitution, the Chief Justice may refer the matter to the committee.

Disciplinary procedure

14. (1) If it is determined under paragraph 13 that a judge be referred to the committee, the committee shall:

(a) Inform the judge in writing of the facts of the alleged breach of this Code; and

(b) Give the judge an opportunity to make a written representation within a period of thirty days from the date he is informed of the alleged breach.

(2) If, after considering the judge's representation, if any, the committee finds that:

(a) there is no merit in the complaint, the committee shall dismiss the complaint and notify the complainant and the judge of its decision; or

(b) there is merit in the complaint, invite the judge to appear before the committee to be heard if he so desires.

(3) If, after due consideration of the representation made by the judge who appears before the committee pursuant to subparagraph (2)(b), the committee is satisfied that:

(a) the breach is proven, the committee may impose on the judge anyone of the sanctions specified in paragraph 16 as it deems appropriate; or

(b) the breach is not proven, the committee shall dismiss the complaint.

(4) If:

(a) the judge does not make any representation within the time specified in subparagraph (1)(b) or within such extended time as may be allowed by the committee;

(b) the judge made such representation but the representation is not satisfactory to the committee; or

(c) the judge does not appear before the committee pursuant to subparagraph (2)(b),

The committee shall then proceed to consider and decide on the sanction to be imposed on the judge as specified in paragraph 16.

[68] According to the facts of the case, it is the applicant's contention that the first respondent had examined both of the complaints against the applicant. The first respondent then found that the complaints have merit and referred the matter to the second respondent. Subsequently, the first respondent through a notice dated 10 August 2020 informed the applicant of the alleged breach of JCE 2009. The respondents gave the applicant the opportunity to make a written representation. Furtherance to that, the applicant then sent his written reply. Upon examined the applicant's reply, the respondents found merits in the complaints. Consequently, the respondents invited the applicant to be heard. Throughout the entire process, the applicant is represented by a solicitor. However, the enquiry before the respondents are halted due to the interim stay granted by this court. The proceeding has yet to be completed.

[69] Therefore, this court concedes with the Attorney General's Chambers' submission that there is no decision that has conclusively determined the rights of the applicant as the Judge of Court of Appeal. Nothing has affected the right of the applicant to pursue his defence in the ongoing proceedings before the second respondent. There has not been any decision made by the second respondent and the applicant has also not been affected by the decision of the respondent. The enquiry has not even taken place at this moment. Therefore, the respondents should be allowed to complete the enquiry in order to determine whether the applicant had breached the Judges' Code of Ethics 2009.

[70] Suffice to say that the enquiry proceeding against the applicant is still at the early stage. The applicant has yet to appear before the respondents. Since enquiry has been postponed and the respondents have not heard and decide on the applicant's representation, then the court agrees with the Attorney General's Chambers' submission that the present proceeding is premature. The applicant has not been found breaching the JCE 2009 as yet. The respondents might have dismissed the complaints if they find the breaches are not proven.

[71] Decision has yet to be made and more importantly, the applicant has not been affected by any decision made by the committee. There is no finding made by the committee that has directly affected the applicant, nor he has been deprived of any benefits he has been permitted to enjoy. In the absence of a final determination by the committee affecting the rights of the applicant, the applicant could not be said to be adversely affected by the notice to show cause dated 10 August 2020 issued by the first respondent.

[72] The present application filed by the applicant prior to the respondents make the decision on the alleged breach of conduct is also amounts to an abuse of the court's process and is an attempt to circumvent the decision-making process entrusted upon the respondents by the statutes.

Conclusion

[73] Based on the aforesaid, this court finds that the applicant had not demonstrated the existence of a *prima facie* case for which further arguments were warranted at the full *inter partes* hearing. The threshold for leave for judicial review application has not been met. Accordingly, the court dismissed the applicant's application for leave for judicial review with no order as to costs.